IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	**DEFENSE REPLY**
	)	**TO GOVERNMENT**
	)	**RESPONSE TO DEFENSE**
	)	**MOTION TO COMPEL**
v.	)	**DISCOVERY #2**
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	29 May 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. In accordance with the Rules for Courts Martial (R.C.M.) 701(a)(2), 701(a)(5), 701(a)(6) and 905(b)(4), Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 846; and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court compel the requested discovery. Specifically, the Defense requests that the Court order:

a) Full investigative files by CID, DIA, DISA, and CENTCOM/SOUTHCOM related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks be produced to the Defense under R.C.M. 701(a)(2). Further, that the Headquarters Department of the Army (HQDA) file related to the 17 April 2012 request be produced under R.C.M. 701(a)(2) and 701(a)(6). *See* Attachment A to Defense Motion to Compel Discovery #2, dated 10 May 2012.

b) FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX files in relation to PFC Manning and/or Wikileaks be produced to the Defense, or alternatively, that they be produced for *in camera* review to determine whether the evidence is discoverable under R.C.M. 701(a)(2) as being material to the preparation of the defense. If the Court concludes that the files of the above agencies are not within the possession, custody, or control of military authorities, the Defense still requests that the Court order production of the entire file under the "relevant and necessary" standard under R.C.M. 703(f);

c) The Government state with specificity the steps it has taken to comply with its requirements under R.C.M. 701(a)(6);

d) The Government produce *Brady* materials from certain identified agencies;

e) The Government produce all evidence intended for use in the prosecution case-in-chief at trial obtained from DIA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, ONCIX and any aggravation evidence that it intends to introduce during sentencing from the above named organizations.

WITNESSES/EVIDENCE

2. The Defense would ask that this Court consider the Appellate Exhibits referenced herein, as well the attachment.

ARGUMENT

3. The Government continues to resist providing the Defense clearly relevant discovery. It continues to state that the Defense's requests "lack specificity" or that the Defense has not "provided a relevant basis for its requests." *See, e.g.* Government Response, p. 3. The Government's refrain is getting old. The Defense has provided the Government with a laundry list of relevant discovery that the Defense does not yet have and that it needs in order to try this case. And the Government responds in its typical nonsensical, smoke-and-mirrors fashion.

4. The Defense rests on the submissions in its Motion to Compel Discovery #2, but would like to specifically respond to certain issues raised by the Government.

A. Defense Discovery Requests for Law Enforcement Files Specifically Identified by the Defense

5. The Government acknowledges that the Defense has made requests for the following:

> **Interagency Committee Review.** The results of any investigation or review concerning the alleged leaks in this case by Mr. Russell Travers, National Security Staff's Senior Advisor for Information Access and Security Policy. Mr. Travers was tasked to lead a comprehensive effort to review the alleged leaks in this case. *See* Defense Discovery Request Dated 8 December 2010 and 13 October 2011 within Appellate Exhibit VIII;
>
> **President's Intelligence Advisory Board**. Any report or recommendation concerning the alleged leaks in this case by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board. *See* Defense Discovery Request Dated 13 October 2011 within Appellate Exhibit VIII;
>
> **House of Representatives Oversight Committee.** The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative Darrell Issa. The committee considered the alleged leaks in this case, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning. *See* Defense Discovery Request Dated 10 January 2011 and 13 October 2011 within Appellate Exhibit VIII.

6. With respect to the Interagency Committee Review, the Government states that the "defense has failed to provide any basis for its request." Government Response, p. 3. The authority, of which the Government should not need to be reminded, is *Brady*. Where the Defense makes a "discovery request[] that involve[s] a specified type of information within a specified entity" the Government has a due diligence obligation under R.C.M. 701(a)(6)/*Brady/Williams* to search for that information. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). There is no indication that the Government has made any effort to search the files of Mr. Travers' investigation.

7. With respect to the President's Intelligence Advisory Board and the House of Representatives Oversight Committee, the Government maintains that it "has no knowledge of any such records, outside publicly made statements through press conferences or media organizations, equally accessible by the defense" and that "[t]he defense is invited to renew its request with more specificity and an adequate basis for its request." Government Response, pp. 3-4. Again, the authority the Government is looking for is *Brady*. Moreover, the Government has resorted to its old tactics in saying it "has no knowledge of any such records." *Id*. This argument is reminiscent of the Government's statement that it was "unaware" of forensic results or investigative files relevant to this case maintained by DOS, FBI, DIA, ONIX and CIA. *See* Appellate Exhibit XVI. As the Court stated in its Ruling, "The Government has advised the Court it is 'unaware' of any forensic results or investigative files [maintained by the specified agencies]. The Government has a due diligence duty to determine whether such forensic results or investigative files that are germane to this case are maintained by these agencies." *See* Appellate Exhibit XXXVI at p. 11.

8. Suspiciously, the Government states in footnote 4 that "the prosecution is in the process of searching for discoverable information from the Intelligence Advisory Board under its ethical responsibilities." Government Response, p. 4. First, the Defense request was made in October 2011, 7 months ago. Why is the Government "in the process of searching for discoverable information"? Why haven't these files yet been searched? The Defense would venture to guess that the Government's "diligent" search began when the Government received the Defense's motion to Compel Discovery #2 on 10 May 2012. Second, the Government's footnote is inconsistent with the position in its motion that the Defense has not provided a specific basis for discovery and that it has "no knowledge" of discoverable information. Which is it? Is the Government's position that the Defense is entitled to *Brady* material from the Intelligence Advisory Board files, or that information from these files is not discoverable?

9. Further, the Government's (footnote) concession that the Defense is entitled to *Brady* information from the Intelligence Advisory Board begs the question of why the Defense is also not entitled to *Brady* material from the other two specified sources (the Interagency Committee Review and House of Representatives Oversight Committee). It is not clear to the Defense what is so special about the Intelligence Advisory Board that the Government is searching those files for *Brady*, but not searching the other files.

B. Files that the Government Does Not Dispute Are Within Military Possession, Custody and Control

10. The Government states that the Defense is not entitled to certain files from DIA, DISA, CENTCOM and SOUTHCOM that are clearly within military possession, custody and control for two reasons – first, the defense failed to provide a specific request; and second, the defense failed to provide an adequate basis for why all such records are discoverable. Government Response, p. 6.

11. The Government laments that the Defense failed to provide specificity in its request. The Defense finds the Government's position almost laughable. At the past motions argument, the Defense raised with the Court the fact that the Government represented that DIA and ONCIX do not have any investigative files, all while producing to the Defense in discovery what the Defense would consider to be investigative files. *See* Appellate Exhibit LVI. The Government then went to great pains to specify that DIA and ONCIX did not technically have an "investigation" into the leaks, nor did they have a "damage assessment." This culminated in the Government submitting the Prosecution Brief Discussing Investigations and Damage Assessments where it sought to define the scope of what it means by "investigation" and what it means by "damage assessment." *See* Appellate Exhibit LXXII. According to the Government's Brief, "[i]nvestigations can be broken down into two categories: criminal and administrative. Criminal investigations are concerned with discovering evidence and finding the individual responsible for the crime. Administrative investigations encompass fact finding inquiries." *Id*., p. 1. The Government stated that "damage assessments" as "multi-discipline, multi-agency, lengthy inquiries, consider the effects of compromised classified information to reach strategic opinions." *Id*. Apparently, the *Brady* material from ONCIX that the Government produced was neither an "investigation" nor a "damage assessment" according to the Government's arbitrary delineation of those terms. The Defense asked the Government *how* it should phrase a discovery request in order to obtain material similar to the ONCIX material (i.e. documents that deal with damage from the leaks that are neither "investigations" nor "damage assessments"). The Government indicated that, for whatever reason, the proper term was "working papers."[1]

12. Knowing that the Government would fabricate a definition of "working papers" that somehow avoided producing what the Government knows the Defense is asking for, the Defense requested: information "related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks (to include any document, report, analysis, file, investigation, letter, working

[1] It is unclear why the Government believes that the term "working papers" captures what the Defense is seeking (i.e. reports, assessments, documents, emails, etc. that chronicle the harm, if any, from the alleged leaks). The term "working papers" suggests to the Defense that the relevant government agency is still working with the information in question. For instance, the Environmental Protection Agency recently wrote to the Government stating, "Approximately one year ago, after reviewing approximately 2400 documents, EPA determined that there were no EPA documents that were problematic and needed to be reported and provided to NCIX." *See* Attachment. Similarly, Human Health Services wrote that "HHS/OSSI reviewed about 6 thousand documents. We found that these documents did not reflect any damaging or derogatory comments related interactions with foreign counterparts/officials. Most of the documents pertained to personnel movements and scene setters for foreign trips." *Id.* Even though the Defense is seeking this type of information (i.e. information about whether the alleged leaks caused harm within different agencies of government), it does not believe that the emails from the EPA or HHS would qualify as a "working paper." Consequently, if the Defense had simply asked for "working papers" the Government would have responded that it did not have any discoverable material, as it has in the past.

paper, damage assessment (or anything that can be reasonably construed as falling within the aforementioned)).”[2] Defense Motion, p. 4. The Defense included the term “working papers” to make it abundantly clear that the Defense is looking for information that might not meet the Government’s overly technical definition of “investigation” and “damage assessment.”

13. Ironically, when the Defense made a specific request for an “investigation” or a “damage assessment,” the Government responded that because these are terms of art for the Government, it did not have any responsive material. When the Defense broadened its request to capture more than the Government’s technical (and self-imposed) definitions, the Government complained that the request was “too broad.” The Defense is not clear on what magic language the Government would like for the Defense to use to convey what everybody understands the Defense is looking for.[3] According to the Government, the Defense’s previous requests were “too narrow” and now they are “too broad.” The Defense believes that no Defense discovery request would ever be “just right” to satisfy Goldilocks.

14. Moreover, the Government cannot even keep track of its own definitions. In its Response, it indicates that it has disclosed “twenty-seven damage assessments … [and] has retrieved eight additional assessments.” Government Response, p. 16. The Government is clearly not referring to “damage assessments” but rather to what it would term “working papers” (e.g. reports from departments such as the Department of Housing, the National Archives, etc. regarding the impact of the leaks). By morphing, distorting and constantly changing definitions, the Government is trying to “define” itself out of producing relevant discovery. It cannot be permitted to do this.

15. The Government then complains that the Defense has failed to provide an adequate basis for discovery. The Government states that “[r]equesting all records, without limitation, does not demonstrate ‘an adequate theory of relevance’ to justify the compelled discovery.” Government Response, p. 7. The Government, again in a throwaway footnote, states that it “estimates that all such records would consist of more than 250,000 pages.” Government Response, p. 7. So the Government is saying that there are 250,000 pages in its possession, custody and control that relate to the accused, WikiLeaks and/or the damage occasioned by the leaks that it has not produced to the Defense? And that possibly it has not searched for *Brady*? If so, this is very disconcerting to the Defense.

16. The Government also states that “the prosecution agrees that some portions of the remedial process may be discoverable under RCM 701(a)(6), *Brady*, or if the defense can demonstrate an adequate theory of relevance (e.g. portions relevant to the charged offenses).” Government Response, p. 8. The Defense is not clear on what the Government is saying. Is there material within DIA, DISA, CENTCOM and SOUTHCOM that relates to the remedial process that the Government has not disclosed? If not, why not? The Defense is also not clear on what the Government means in its parenthetical – “e.g. portions relevant to the charged offenses.” Government Response, p. 8. How can the Defense identify the “portions” of the remedial measures when it has not seen them? In short, the Defense has already explained numerous times why remedial measures are relevant to the charged offenses and/or sentencing. It is not a

[2] The Government says in footnote 7 that “[o]nly damage assessments and working papers, related to a damage assessment, have been specifically requested by the defense.” The Defense does not understand what this means.
[3] Apparently, the Government is able to clearly understand its own formulation of the discovery request to HQDA. *That* information is exactly what the Defense is looking for as well.

large logical leap to conclude that if the remedial measures were fairly insignificant, this would be favorable for sentencing; conversely, if the remedial measures were fairly significant, this would not be as favorable for sentencing. As such, the Defense cannot understand why the Government does not see the very obvious relevance of the remedial measures contained in documents within its possession, custody and control.

17. The Government opposes producing to the Defense the results of the (delayed) HQDA memo. It states that:

> The prosecution recently received the HQDA records and has been reviewing the records for information discoverable under RCM 701(a)(6) and Brady under its ethical obligations. The prosecution will provide all information within the HQDA records that is discoverable under RCM 701(a)(6) and Brady. Government Response, p. 8.

The Government believes, however, that such records are not discoverable under R.C.M. 701(a)(2) because "defense has neither put the prosecution on notice of what the defense desires nor provided an adequate basis for why all information are [sic] 'material to the preparation of the defense.'" *Id.* The Government's first reason for not producing these records makes no sense. The Government asserts that the "defense has [not] put the prosecution on notice of what the defense desires." The Defense "desires" the documents responsive the HQDA request.[4] The Government's second reason is equally disingenuous – that the Defense has not provided an adequate basis for why all information is material to the preparation of the Defense.[5]

18. If one even cursorily examines the Government's request, it is abundantly clear why all of this information would be material to the preparation of the Defense. The Government requested the following:

> … any documents or files with material pertaining to: any type of investigation; working groups; resources provided to aid in rectifying an alleged compromise of governrnent [sic.] information; damage assessments of the alleged compromise; or the consideration of any remedial measures in response to the alleged activities of PFC Manning and Wikileaks. *See* Attachment A to Defense Motion to Compel Discovery #2, dated 10 May 2012.

The Government's assertion that the Defense has not sufficiently proffered why damage assessments, remedial measures, and investigations into the leaks is relevant is like the Government making the Defense articulate why the CID file is material to the preparation of the Defense. It is so plainly self-evident from the documents requested why they would be relevant for the Defense that the Government simply looks like it is hiding something by refusing to turn them over pursuant to R.C.M. 701(a)(2).

[4] At footnote 10, the Government maintains that all this information is not in a specific "file" (it then proceeds to define 'file' for the Defense's edification). The Government knows exactly what the Defense is seeking – the documents that were sent to HDQA in response to this Memo. An instruction on the word "file" is not necessary.
[5] The Government apparently concedes that "the standard of materiality [relating to RCM 701(a)(2)] is not a high one." Government Response, p. 11.

C. Files of Joint Investigative Agencies and Agencies that Are Closely Aligned with the Government

19. As argued in the Defense's Motion to Compel Discovery #2 and in Appellate Exhibit LXVIII, the Government is misunderstanding what term needs interpreting in R.C.M. 701(a)(2). It is not the term "military authorities" that needs interpreting; rather it is the term "possession, custody and control" that needs interpreting.[6] The Defense largely rests on its previous submissions in this respect. The Defense, however, would like to clarify several points with respect to the Government's argument that the documents requested by the Defense are not within the possession, custody and control of military authorities under R.C.M. 701(a)(2).

20. First, the Government has very conveniently set up a straw man when it says that the Defense defines "military authorities" to include "the United States Government." Government Motion, p. 10. That is not the Defense's argument. The Defense does not believe that the Government, under R.C.M. 701(a)(2) needs to search the files of the "United States Government." The Defense's position is that the trial counsel's obligations to disclose information to the Defense pursuant to R.C.M. 701(a)(2) extend to those documents of closely aligned and jointly investigating agencies because such documents are within his possession, custody and control.

21. Second, the Government maintains that "[e]xtending the definition of 'military authorities' beyond military commands or organizations subject to military control would carry drastic implications:

> Subjecting the files of all closely aligned organizations, under Williams, to open inspection, if "material to the preparation of the defense," would result in a new graymail tactic, a "problem" in discovery practice. See, e.g., MRE 505, analysis; see also AE LIII at 4 (the defense previously highlighted that "the standard of materiality [relating to RCM 701(a)(2)] is not a high one"). Here, such a tactic would lead to nearly insurmountable consequences. For example, if an inspection of all FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX classified records "material to the preparation of the defense" is allowed, assuming such exist, the defense could flood the Court with MRE 505 procedures, stall the criminal proceeding, and, if the privilege under MRE 505 is invoked in light of national security concerns, inundate those agencies with classification reviews. See RCM 102(b). Government Response, p. 12.

22. The Government's argument overlooks the fact that, in federal courts across the country, judges have uniformly accepted the interpretation advanced by the Defense. The judicial system is not in shambles; the "drastic implications" cited by the Government have not come to fruition; there has not been widespread "graymailing" of the United States Government; the consequences have not been "nearly insurmountable" in federal court. The Government's overreaction to a very well-established federal rule again suggests that there is something that the Government is trying to hide by not turning over documents of closely aligned agencies and agencies that participated in a joint investigation.

[6] The Defense assumes that the second reference to the Defense's interpretation of R.C.M. 701(a)(2) on p. 10 (middle of the page) is simply a typo.

23. Third, the Government states that it does not have "both access to, and knowledge of" all records of jointly aligned agencies or agencies that participated in a joint investigation. Government Response, p. 13 (emphasis in original). It appears that the Government is saying that it does not have "access to" the files because "the prosecution has only limited access to the requested records" and has "no authority to remove the documents from the agencies' hands." *Id.* It further states that in the event that the prosecution does not have the authority to disclose certain information, then the prosecution "does not, and cannot, have access to the information for discovery purposes." *Id.* at p. 14. The Government is confusing "access" with "authority to disclose." Access simply means the right to look at, inspect or get to the information in question. Access does not necessarily imply that the accessor has the right to give or disclose the information in question. For instance, the Defense has access to classified discovery in this case. However, the Defense does not have the authority to disclose that information publicly. Thus, "access" addresses only the question of whether the Government has had the right or ability to see, inspect, examine, look at, etc. the information in question. It does not address the question of whether the Government is permitted to disclose that information. If the Government's interpretation were accepted, it would gut the "possession, custody and control" analysis in Federal Rule 16. All information that is not in the physical possession, custody or control of the trial counsel will be "owned" by, to use the Government's expression, other equity holders. Thus, all the trial counsel would need to do is say that while it has the ability to see, observe or examine the material in question, it does not have permission to disclose it. Such is the functional equivalent of leaving evidence to "repose" in the hands of another agency, as discussed in *Trevino. See United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977). Finally, the Court's ruling contemplates that evidence may be discoverable under R.C.M. 701(a)(2) as being within the custody, possession, and control of military authorities, but that the Government might not have permission to disclose that information, thus necessitating resort to R.C.M. 703. *See* Appellate Exhibit LXVIII ("[T]he fact that information controlled by another agency is discoverable under RCM 701 may make such information relevant and necessary under RCM 703 for discovery.").

24. Finally, the Government argues that if such documents are determined to be in the possession, custody or control of military authorities for the purposes of R.C.M. 701(a)(2), that it specifically objects to producing the following: (1) any Government Agency forensic results or investigative files and any damage assessment; (2) any documents relating to the Chiefs of Mission review, the WikiLeaks Working Group, the "Mitigation Team," and the DoS's reporting to Congress in December 2010; and (3) DSS files or investigations dealing with Specification 12 or 13 of Charge II. Government Response, p. 14. The Government argues that the Defense has failed to "provide specificity or an adequate basis for its request." *Id*. The Defense's request with respect to these documents was very specific and the "basis" for the request has been articulated many times (and, in any event, is self-evident from the nature of the documents requested).

CONCLUSION

25. Pursuant to the Defense's Motion to Compel Discovery #2 and this Reply Motion, the Defense respectfully requests that this Court compel the requested discovery and that this Court

order the Government to provide an accounting in respect of its *Brady* obligations pursuant to the Court's inherent authority under R.C.M. 102, 701(g)(3)(D), and 801(a)(3).

Respectfully submitted,

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